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### Justice versus Peace?

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# Global Justice Academy

## Blog

Global Justice Academy, University of Edinburgh

## Justice versus Peace? Syrian Atrocities and International Criminal Justice

Posted on **January 27, 2014** by **Harriet Cornell**

**Christine Bell, Professor of Constitutional Law and Director of the Global Justice Academy, comments on recent Human Rights developments in Syria.**



A recent [report into torture](#) – interestingly with a connection to Scotland (one of the researches is based in Dundee University) – has provided strong evidence that the Assad regime has been involved in gross human rights violations. The report was produced by a set of international experts in international criminal law and forensics, requested by Carter-Ruck & Co solicitors, acting for Qatar National State who apparently support the Syrian National Movement (none of this is very clear from the face of the report, which has been linked to from Carter-Ruck's website, neither is it very clear from the [Carter-Ruck press release](#) which does not mention a client).

While few parties in conflicts have clean hands – and Syria is no different – the evidence of a state using its resources and bureaucracy for systematic torture of its citizens is still shocking.

Inevitably with the allegation serious international crimes thoughts will turn to international criminal law. [Human Rights Watch, have produced a thorough and useful briefing](#) on Syria and international criminal law. To make my own summary.

## Can Syria be brought before the International Criminal Court?

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1. Syria is not a party to the **Rome Statute** that established and sets out the jurisdiction of the **International Criminal Court (ICC)**. The court cannot therefore investigate or prosecute.
2. Unless the UN Security Council refers it to the prosecutor – as they did in Dafur with Sudan who was also not a party to the Rome Statute.
3. Six UN Security Council members, according to HR Watch, have publicly supported a referral: France, the United Kingdom, Luxembourg, Argentina, Australia and South Korea.
4. However, as attempts to pass previous UN Security Council resolutions on Syria have illustrated, the UN Security Council permanent members, all of whom can veto the passing of a resolution, are divided in their stance on the Assad regime. Russia in particular remains supportive of the regime. These same divisions are likely to prevent a referral to the ICC – in particular given what appears to be clear evidence likely to support the indictment of its head of state, President Assad.

## Would international criminal prosecution be a barrier to peace talks?

A key political issue – and a common one where the ICC is suggested during conflict – is whether the involvement of the ICC would prove a barrier to peace talks. Human Rights Watch, who support the ICC being given jurisdiction to deal with Syria, argue that indictments are not a barrier to peace talks, but can actually help them. I quote:

The record from other conflicts, such as those in the Balkans, confirms that criminal indictments of senior political, military, and rebel leaders can actually **strengthen peace efforts** by delegitimizing and marginalizing those who stand in the way of resolving the conflict. Further, the failure to hold those responsible for the most serious international crimes to account can **fuel** future abuses.

In Bosnia the indicted Serbian political and military leaders Karadzic and Mladic were banned from the peace talks that resulted in the Dayton Peace Agreement. Similarly, Charles Taylor's indictment by the Sierra Leone Special Criminal Court effectively removed him from the Liberian peace talks in which he was involved. In fact the indictment was publicly revealed when he was in Ghana on his way to Liberian peace talks – even more interestingly David Crane was the prosecutor who released the indictment (and interestingly, is also one of the Syria report's authors, also released the day before peace talks were to start).

In both the case of Milosovic and Taylor, it has indeed been argued that indictment and arrest removed perpetrators of atrocities from peace negotiations and that this was useful to the success of the Dayton and Liberian peace processes. The exclusion of key human rights abusers from peace negotiations can also be understood to have underlined the importance of the rule of law and centrality of human rights to any settlement, an issue which was central to the peace negotiations and to the peace agreements that resulted.

However, in Bosnia, Milosovic, who was later indicted by the ICTY not only was present at the Dayton peace talks, but was a key signatory of the peace agreement. His part was understood to be crucial to any negotiated end to conflict – particularly given the absence of Karadzic and Mladic.

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Sudan, another country that has not signed the Rome Statute, was referred to the ICC by the UN Security Council, as a result of the Darfur conflict, resulting in the indictment of the first Head of State, President of Sudan, Al-Bashir. This indictment was opposed by the African Union among others, and triggered an on-going debate as to whether the action was legitimate, the indictment based on sound evidence, and the referral and indictment politically wise in terms of the peace process. These issues have not gone away. The case has fuelled African opposition to the ICC, and Al-Bashir is still at large and has been welcomed in a number of Africa countries. Post indictment he signed peace agreements for Darfur, and currently appears to be a feted mediator in South Sudan's current conflict. Perhaps this shows that indictments do not affect peace negotiations but not, I suspect, in a way that Human Rights Watch would welcome.

However, indicting Assad or anyone involved in the negotiations, would make it very difficult for negotiations such as those currently underway in Geneva to take place. Countries that are party to the Rome Statute – which include Switzerland – have a responsibility to uphold it, which arguably includes the responsibility to arrest. To quote the ICC website

State Parties to the ICC have a legal duty to cooperate fully with the ICC. . . . When the Court's jurisdiction is triggered by the Security Council, the duty to cooperate extends to all UN Member States, regardless of whether or not they are a Party to the Statute. The crimes within the jurisdiction of the Court are the gravest crimes known to humanity and as provided for by article 29 of the Statute they shall not be subject to any statute of limitations.

At the minute supporting negotiations is morally difficult; an indictment would make it legally difficult.

However, the deeper problem is that those indicted and the institutions loyal to them, may be vital to reaching a stable settlement to the conflict. Of course, whether they are vital or dispensable is impossible to definitively determine: it is a matter to be deliberated in nuanced political debate and analysis, rather than something that is susceptible to legal judgment or fiat.

Politics and the business of justice should perhaps not be allowed to mix. But the simple fact is that in on-going conflicts they are closely intertwined and interdependent. Fighting to the bitter end in pursuit of a fully just solution, rather than negotiating a messy end to a messy conflict, seldom brings about a more just peace – more often it creates a wasteland from which the society takes decades to recover if it ever does. In short, there are principled arguments in favour of inclusive negotiations. Conversely, pushing aside all questions of accountability as capable of being skirted around for all time is not only unprincipled, it is politically naïve. People will indeed bring up the bodies. There are strong

political reasons to address the past if you want to avoid it infecting the future.

Intractable conflicts in deeply divided societies are difficult to end. Their violence and taints all those involved, and so justice arguments are employed by all sides in their favour. Similarly, everyone announces themselves as indispensable to negotiations and tries to make that true (usually by fighting all the harder). In short, both international criminal law and attempts at international mediation, face similar difficulties of how to blend real politik with demands of justice, even if their means are more palatable and their politicisation less obvious.

In fact, both political negotiations and forms of accountability may be important to creating a peaceful society in the future. A genuine dilemma exists as to how and when to pursue the demands of justice and peace at moments when they seem to demand different timetables and different courses of action.

This peace v justice dilemma cannot be eliminated or wished away, but it can be managed and navigated in better and in worse ways. Managing it in a better rather than a worse way starts with acknowledging the dilemma and reckoning with it. Neither human rights advocates nor those who support unbridled negotiations, do well to ignore or down-pay the challenging arguments on the other side.

**Christine Bell, Director of the Global Justice Academy has written extensively on the 'peace v justice' dilemma in conflicts within states.** For those who are interested in International Criminal Law, the Global Justice Academy is hosting a [round table](#) with legal officers from a number of different international criminal tribunals on the 12 February 2014. We are also supporting a seminar on '[Feminist Strategies in International Law](#)', that will centrally address issues of international criminal justice on 6 February 2014. Finally, if you are interested in studying these issues at University of Edinburgh, please see our new [Human Rights LLM](#), which has an emphasis on conflict resolution issues.

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